IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 25.09.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.890 of 1992

Seerangan .. Appellant/Plaintiff

vs.

1.Chinnanna Gounder
2.Kuppayammal
3.Kandasamy
4.Venkatachalam
5.Manickam .. Respondents/Defendants

Prayer: This Appeal has been preferred against the Judgment and Decree dated 25.04.1990 in O.S.No.97/1986 on the file of the Sub-Court, Sangagiri.

For Appellants : Mr. V.Ramajagadeesan
For Respondents : Mr. R.Subramaniam

JUDGMENT

This Appeal has been preferred against the Decree and Judgment passed in O.S.No.97 of 1986 on the file of the Sub-Court, Sangagiri.

2. The averments in the plaint sans irrelevant particulars are as follows:

2(a) The plaint schedule property absolutely belongs to Defendants 1 to 5. Defendants 1 and 2 are husband & wife and Defendants 3 to 5 are their sons. Defendants 1 to 5 entered into an agreement with the plaintiff to sell the suit property on 16.3.1985 for a some of Rs.74,500/- and received a sum of Rs.4,500/- as advance. The plaintiff also agreed to pay another sum of Rs.35,000/- on வைகாசி-20, தமிழ் ஆண்டு குரோதனா corresponding to the English calendar June 2, 1985 and another sum of Rs.35,000/- at the time of the execution of the sale deed. It was agreed between the parties to complete the sale on or before தை-30, தமிழ் ஆண்டு குரோதனா corresponding to English calendar February 12, 1986. Defendants 1 and 2 also agreed to obtain the signature of their daughter Vasantha. The sale agreement was reduced to writing and all the parties have

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

signed in the agreement.

2(b) As per the terms of the sale agreement, the plaintiff paid an advance of Rs.4,500/- on 16.03.1985 i.e. on the date of execution of the sale agreement itself. On various occasions the plaintiffs had paid another sum of Rs.35,000/- and an endorsement to that effect was obtained from the Defendants on the reverse of the page 2 of the said sale agreement dated 16.03.1985. The Defendants have also acknowledged the above said payment of Rs.35,000/- on various dates by the plaintiff on the reverse side of the page No.3 of the said sale agreement. The plaintiff was also ready and willing to perform his part of the contract i.e. to pay the balance of the sale consideration viz. Rs.35,000/- and to get the sale deed executed.

2(c) The Defendants are bound to execute the sale deed in respect of the suit property in favour of the plaintiff after receiving the balance of the sale price viz. Rs.35,000/-. The time stipulated for executing the sale deed was on or before 12.02.1986. The plaintiff went to the Defendants' house by 9.00 am on 12.02.1986 for the purpose of taking them to the Sub-Registrar Office, Omalur, but to his surprise no elders were available in the Defendants' house, but the children found therein, who informed the plaintiff that the Defendants have already left to Omalur. The plaintiff rushed to Omalur and waited upto 10.00 am but to his dismay none of the Defendants have turned up. Thereafter, the plaintiff sent a telegraphic notice to the Defendants informing them about his (plaintiff) presence in the Sub-Registrar's Office and he was ready and willing to get the sale deed as per the terms of the sale agreement. The telegraphic notice was issued through phonogram. The Defendants have failed to perform their part of the agreement. Hence, the suit has been filed for specific performance of contract dated 16.3.1985 by directing the Defendants to receive the balance of sale price viz. Rs.35,000/- and to execute sale deed in favour of the plaintiff in respect of the plaint schedule property and for costs.

3. The Defendants 1, 2, 4 and 5 have adopted the written statement filed by the 3rd Defendant, which reads as follows:

3(a) The sale agreement dated 16.03.1985 for a sum of Rs.74,500/- is admitted and the Defendants also received Rs.4,500/- towards advance. On the date of execution of the above said sale agreement, the Defendants 1 and 2 never agreed to get the signature of their daughter Vasantha at a later point of time.

3(b) It is false to state that the plaintiff had paid Rs.35,000/- on various dates to the Defendants and it is equally false to allege that such payment of the plaintiff was made or endorsement was made by the Defendants on the revers side of the page Nos.2 & 3 of the said agreement. If really the plaintiffs would have made payment on different dates, the Defendants would have made the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

endorsements on each payment dates separately. The Defendants have put their thumb impression on the revers of the page No.3 of the sale agreement at the time of the execution of the sale agreement. The plaintiff insisted to put all the Defendants thumb impression on the reverse side of the last page of the sale agreement since the signature would differ from time to time. The subsequent payment of Rs.35,000/- was not true and contains in the second page of the sale agreement would not points out the dates.

3(c) It is false to allege that the plaintiff demanded the Defendants on many occasions to receive the balance of sale price and to execute the sale deed. This is also equally false that the plaintiff came to the house of the Defendants on 12.02.1986 at 9.00 am. The Defendants were present in the house on that day throughout. The Defendants did not get any telegraphic notice on 12.02.1986. It is falsely alleged that the plaintiff was ready to pay the balance amount on or before 12.02.1986 to perform his part of the contract. The plaintiffs paid only Rs.4,500/- towards sale agreement and second time payment was not paid by the plaintiff. The plaintiff has not complied with the conditional payment in the sale and has not performed his part of the contract.

3(d) The plaintiff has no means to pay the second item of Rs.35,000/- as per the sale agreement within வைகாசி-20, தமிழ் ஆண்டு குரோதனா corresponding to the English calendar June 2, 1985 and also to pay another Rs.35,000/- within தை/30, தமிழ் ஆண்டு குரோதனா corresponding to English calendar February 12, 1986. The Defendants are always ready and willing to perform their part of the contract as per the terms of the sale agreement. The Defendants have not intended to alienate such property to others. The plaintiff is not entitled to get any relief in the suit on the basis of the sale agreement dated 16.03.1985 since the sale agreement is not in force. The suit is not maintainable and hence the suit is liable to be dismissed with costs.

4. On the above pleadings the learned trial Judge has framed the following four issues:

i) Whether the alleged endorsement for the payment of Rs.35,000/- towards part of the sale consideration on the back side of the sale agreement is true?

ii) Whether the plaintiff was ready and willing to perform his part of the contract as per the sale agreement?

iii) Whether the plaintiff is entitled to get a decree in terms of the sale agreement dated 16.03.1985?

iv) To what relief the plaintiff is entitled?

After going through the various provisions of law under the Contract Act and also under the Specific Relief Act and the evidence of the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

plaintiff and the defendants' both oral and documentary, the trial Court has come to an ultimate conclusion that the plaintiff is not entitled to any relief in the suit and consequently dismissed the suit with costs. Aggrieved by the findings of the learned trial Judge, the plaintiff has preferred this appeal.

5. Now the point for determination in this appeal is whether the plaintiff was ready and willing to perform his part of the contract as per the sale agreement entered into between the plaintiff and the defendants dated 16.03.1985?

6.The Point:- Ex.A.1 is the sale agreement dated 16.03.1985 entered into between the plaintiff and the defendants. Under Ex.A.1, the defendants have agreed to sell the plaint schedule property to the plaintiff for a sale consideration of Rs.74,500/- and in pursuance of the said sale agreement the plaintiff has paid Rs.4,500/- towards the advance of the sale consideration on the date of the execution of the said Ex.A.1-Sale Agreement. As per the terms of the sale agreement out of the balance of sale consideration of Rs.70,000/-, Rs.35,000/- was agreed by plaintiff to be paid on or before வைகாசி/20, தமிழ் ஆண்டு குரோதனா corresponding to the English calendar June 2, 1985 and remaining part of the sale consideration of Rs.35,000/- was agreed by the plaintiff to be paid on or before ij-30. jkpH; Mz;L Fnuhjdh corresponding to English calendar February 12, 1986.

7. It was agreed upon between the parties under the sale agreement that in case if the plaintiff fails to pay the balance of sale consideration before the dates agreed upon between the parties as indicated above, the plaintiff has to forego the advance amount paid by him and there is another default clause incorporated under Ex.A.1 as to in case of failure of the defendants, the plaintiff is entitled to get back the sale deed registered by paying the balance of the sale consideration. Ex.A.2 is an endorsement on the back of the Ex.A.1 at page 2 and 3, to the effect that the plaintiff had paid Rs.35,000/- towards part of the sale consideration on 10.06.1985. But as per the terms of Ex.A.1 sale consideration, the said part of sale consideration of Rs.35,000/- ought to have been paid on or before வைகாசி/20, தமிழ் ஆண்டு குரோதனா corresponding to the English calendar June 2, 1985. But Ex.A.2 endorsement shows that the payment was received even after the stipulated date of June 2, 1985. So, the contention of the plaintiff that the plaintiff has not failed to perform his part of the contract before the time stipulated under the agreement holds no water because if the parties would have thought that the time is essence of contract under the agreement, the defendants would not have received the payment of Rs.35,000/- towards part of the sale consideration by the plaintiff after the expiry of the time stipulated under Ex.A.1-Sale Agreement i.e. on 10.6.1985.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

8. Now the next point to be considered is whether the plaintiff was ready and willing to perform his part of the contract as per the terms stipulated under Ex.A.1-sale agreement. According to the terms of Ex.A.1, the balance of sale consideration of Rs.35,000/- is to be paid on or before தை/30, தமிழ் ஆண்டு குரோதனா corresponding to English calendar February 12, 1986. According to the plaintiff, he has sent telegraphic notice to show his bone fide as to his readiness and willingness to perform his part of the contract before தை/30, தமிழ் ஆண்டு குரோதனா corresponding to English calendar February 12, 1986. But the plaintiff has not produced any copy of the telegraphic notice to show his bone fide that he was ready and willing to perform his part of the contract before தை/30, தமிழ் ஆண்டு குரோதனா corresponding to English calendar February 12, 1986. Ex.A.3 is the reply notice sent by the defendants to the plaintiff. In the reply notice telegraphic notice dated 12.2.1986 said to have been sent by the plaintiff was admitted, but they have stated that no notice as alleged in the telegraph was received from the plaintiff. It has been specifically stated in the reply notice-Ex.A.3 itself that plaintiff has failed to perform his part of the contract by not complying with the condition of paying the balance of Rs.35,000/- on or before தை/30, தமிழ் ஆண்டு குரோதனா corresponding to English calendar February 12, 1986. So it is the bounden duty of the plaintiff to prove that he was ready and willing to perform his part of the contract. There was no document produced to show that the plaintiff was having sufficient funds to pay the balance of Rs.35,000/- on or before தை/30, தமிழ் ஆண்டு குரோதனா corresponding to English calendar February 12, 1986, as per the terms of the sale agreement-Ex.A.1.

9. In the plaint, the plaintiff would state that on 12.2.1985, he went to the Sub-Registrar's Officer and waited for the arrival of the defendants for registration of the sale deed with the balance of the sale consideration. P.W.1 in the chief examination has stated that on the date of telegraphic notice was given, he went to the Omalur Sub-Registrar Office for registration. But there is no evidence on record to show that the plaintiff went to Omalur Sub-Registrar's Officer on 12.02.1986 at 10.00 am with the balance of the sale consideration and waited for the defendants for execution of the sale deed in term of Ex.A.1. But in the cross-examination, P.W.1 would admit that if telegraph was sent in the morning at 10.00 am it will reach only in the evening at about 5.00 pm or 6.00 pm. P.W.1 further admitted in the cross-examination, he has not sent any advocate notice to the defendants informing that he was ready and willing to perform his part of the contract. P.W.2 was examined by the plaintiff to show that in the year 1985, the plaintiff had borrowed Rs.30,000/- from P.W.2. P.W.2 in his chief examination has deposed to the effect that he was cultivating the lands of the plaintiff for the past four years and he had paid Rs.30,000/- in the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

year 1985 to the plaintiff towards the lease amount. P.W.2 has also deposed that he lend a loan to the plaintiff under promissory note. But he has not produced any promissory not to substantiate this contention. On the other hand, he would admit that in the year 1935, he had lend loan to the plaintiff under the promissory note. So the evidence of P.W.2 that he had advance loan under promissory note to the plaintiff in the year 1935 has no barring to the facts of this case. The plaintiff has not produced any bank pass book to show that he was having sufficient funds during தை/30, தமிழ் ஆண்டு குரோதனா corresponding to English calendar February, 1986 to pay the balance of Rs.35,000/- towards the part of sale consideration to complete the sale.

10. The learned trial Judge after analysing both the oral and documentary evidence has come to a definite conclusion that the plaintiff has failed to prove that he was ready and willing to perform his part of the contract as per the terms of Ex.A.1-sale agreement deed.

11. Yet another point to be decided in this case is whether the plaintiff is entitled to get back the advance amount as per Ex.A.1 and A.2-endorsement. Since there is no alternative prayer in the plaint for return of the advance amount said to have been paid by the plaintiff, the plaintiff is not entitled to get back the same under Section 22(2) of the Specific Relief Act, 1963. Section 22 of the Specific Relief Act, 1963 runs as follows:

> i) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908(5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-
>
> a) possession, or partition and separate possession, of the property, in addition to such performance; or
>
> b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.
>
> 2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed.
>
> Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceedings,

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

allow him to amend the plaint on such terms as may be just for incuding a claimfor such relief.

3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under Section 21.

In this case the plaintiff under the plaint has not made any specific claim for return of the advance amount alleged to have been paid by him. Further, the plaintiff has not taken any steps before the trial court, after filing the plaint, to amend the plaint so as to include the prayer for the return of the advance amount said to have been paid by him under Ex.A.1 and A.2.

12. The relevant case law on this point is AIR 1982 SUPREME COURT 818 (Babu Lal vs. M/s.Hazari Lal Kishori Lal and others). The exact observation of the Honourable Apex Court in the said case runs as follows:

"The section enacts that a person in a suit for specific performance of a contract for the transfer of immovable property, may ask for appropriate reliefs, namely, he may ask for possession, or for partition or for separate possession including the relief for specific performance. These reliefs he can claim, notwithstanding anything contained in the Code of Civil Procedure, 1908, to the contrary. Sub-Sec (2) of this section, however, specifically provides that these reliefs cannot be granted by the Court, unless they have been expressly claimed by the plaintiff in the suit, Sub-sec.(2) of the section recognised in clear terms the well-established rule of procedure that the Court should not entertain a claim of the plaintiff unless it has been specifically pleaded by the plaintiff and proved by him to be legally entitled to. The proviso to this sub-section (2), however, says that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stages of the suit, the Court shall permit the plaintiff at any stage of the proceedings, to include one or more of the reliefs, mentioned above by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of this newly enacted provision is to avoid multiplicity of suits and that the plaintiff may get appropriate relief without being hampered by procedural complications."

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

13. In the result, the Appeal is dismissed confirming the Judgment and Decree passed in O.S.No.97 of 1986 on the file of the Sub-Court, Sangagiri. No costs.

ssv

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To,

1. The Subordinate Judge of Sangagir.

2. The Record Keeper, VR Section, High Court, Madras.

1 CC TO MRS. HEMA SAMPATH, ADVOCATE SR 45102

A.S.No.890 of 1992

GM(CO)

BP 25.09.2006

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/